

**Fortune v New York City Hous. Auth.**

2020 NY Slip Op 33871(U)

November 12, 2020

Supreme Court, Kings County

Docket Number: 521950/2017

Judge: Kathy J. King

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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of November, 2020.

PRESENT:

HON. KATHY J. KING,

Justice.

-----X

CLARINGTON FORTUNE,

Plaintiff

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

-against-

AMERICAN PIPE & TANK LINING CO., INC.,

Third-Party Defendant.

-----X

Upon the foregoing papers, defendant New York City Housing Authority (“NYCHA”) and third-party defendant American Pipe & Tank Lining Co., Inc. (“American Pipe”) (collectively referred to as “defendants”), move pursuant to CPLR 4404 (a) for an order, granting a new trial on the issue of damages and granting a remittur of the jury award for \$3 million past and future pain and suffering, and \$132,000 for future lost wages, on the basis that the verdict is excessive and against the weight of the evidence. Plaintiff, Clarington Fortune, submits opposition the motion.

**Background**

Plaintiff, sustained injuries on December 5, 2016 at 921 Myrtle Avenue Brooklyn, New York (“the subject premises”), during the course of his employment as a roofer with American

Pipe. Defendant NYCHA retained American Pipe to replace water tanks at the subject premises. At the time of the accident, plaintiff was 70 years old and was tasked with installing a new water tank when a co-worker, fell approximately 20 feet from the top of the water tank and landed on plaintiff. The resulting impact of the fall caused plaintiff to sustain multiple fractures to his left hip which required two subsequent surgeries, including a hip replacement. Following the accident, plaintiff was diagnosed with a left foot drop and permanent damage to his sciatic nerve.

On November 17, 2017, plaintiff commenced the within action against NYCHA seeking damages for the injuries sustained, as a result of the accident. NYCHA subsequently commenced a third-party action against American Pipe on December 18, 2018 for contractual and common law indemnification. Thereafter, both parties moved for summary judgment, and by order dated December 10, 2019 (J. Martin), plaintiff's motion on the issue of liability pursuant to Labor Law 240 was granted against NYCHA, and NYCHA's motion for contractual indemnification against American Pipe was granted. The matter was then set down for a trial on damages only, and following a jury trial before this Court, plaintiff was awarded \$2,000,000 for past pain and suffering, \$1,000,000 for future pain and suffering over 10 years and \$132,000 for 7 years of future lost earnings. The instant motion followed.

### ***Discussion***

As a rule, it is a well settled function and prerogative of the jury to assess the credibility of witnesses, to resolve conflicting testimony and to determine all factual issues (*see Scott v Mason*, 155 AD2d 655, 656 [2d Dept 1989]). Nevertheless, CPLR 4404 (a) authorizes the Court, in the exercise of discretion, to set a jury verdict aside as against the weight of the evidence, upon a finding that a jury could not have reached its conclusions on any fair interpretation of the evidence (*see Aprea v Franco*, 292 AD2d 478, 479 [2d Dept 2002]). "The standard for

determining whether a jury verdict is against the weight of the evidence is whether the evidence so preponderated in favor of the movant that the verdict could not have been reached upon any fair interpretation of the evidence” (*Martin v New York City Tr. Auth.*, 48 AD3d 522, 523 [2d Dept 2008] [internal citations omitted]).

For a court to conclude that a verdict could not have been reached upon any fair interpretation of the evidence, “[i]t is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). “The test is not merely whether the jury erred in its interpretation of the evidence, but whether any evidence exists to support the verdict” (*Kinney v Taylor*, 305 AD2d 466, 466 [2d Dept 2003], quoting *Barker v Bice*, 87 AD2d 908, 908 [2d Dept 1982]). “Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors” (*Gibson v Singh Towing, Inc.*, 155 AD3d 614, 616 [2d Dept 2017] [internal quotation marks and citations omitted]).

“That there [may be] evidence to the contrary does not justify dismissing the complaint on the ground that the jury's verdict was not based on legally sufficient evidence; rather, such determination is only proper when “ ‘there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the [contrary] conclusion reached by the jury on the basis of the evidence presented at trial’ ” (*Randolph v City of New York*, 69 NY2d 84, 847 [1987], quoting *Cohen*, 45 NY2d at 499).

Defendants have failed to demonstrate that the verdict should be set aside as excessive and against the weight of the evidence pursuant to CPLR 4404(a). The trial transcript and court

exhibits do not support defendants' contention that the jury's determination was based on insufficient evidence. The evidence produced at trial clearly demonstrates that the jury verdict was the product of a valid line of reasoning based upon permissible inferences.

Here, plaintiff's testimony demonstrates that he experienced both physical and emotional consequences from his injuries, consistent with the Court's instruction that "plaintiff is entitled to recover a sum of money which will justly and fairly compensate him for any injury, disability and conscious pain and suffering to date caused by defendant" (PJI 2:280). Plaintiff testified that prior to the accident, he had no injuries which restricted his work as a roofer, and frequented the gym on the weekends to stay physically fit. Plaintiff further testified that as a result of the accident, he had two subsequent surgeries which have restricted his mobility. The first surgery resulted in a shortening of his leg and a foot drop which requires him to wear a brace to keep his foot in place. The second surgery was a hip replacement surgery. Notably, plaintiff testified that his daughter, Donna, comes over every night to prepare dinner and bring groceries, which demonstrates that he is not able to fully perform his activities of daily living.

Additionally, the medical evidence proffered by plaintiff also support his award of damages.

Dr. Jerry Lubliner, an orthopedic surgeon, testified on plaintiff's behalf and found that to a reasonable degree of medical certainty, plaintiff's injuries are permanent in nature and will also restrict plaintiff's daily activities such as getting dressed and tying his own shoes, shopping and cooking. Dr. Lubliner explained that he reached his conclusion largely because plaintiff's injuries have not improved since the injury.

Dr. Ali Guy, a board-certified doctor in the field of physical medicine and rehabilitation, also testified on behalf of plaintiff, and found that to a reasonable degree of medical certainty,

plaintiff's injuries are permanent in nature. He testified that plaintiff will need a home aide to assist him with his daily activities, including but not limited to, showering and putting his socks and shoes on, shopping and cooking, traveling to and from doctor's visits and walking up and down the staircase of plaintiff's second floor apartment, assistance to go back and forth from his health care providers such as Access-A-Ride or a special vehicle, and assistance with home exercises such as stretching and moving his legs and hips. Dr. Guy also submitted a report on plaintiff's behalf that plaintiff would need a home aide for eight hours a day, seven days a week. By contrast, Ms. Wendy Cummins, a certified life care planner, testified on behalf of defendants that based on her review she believed that plaintiff would only require home assistance eight hours per week. In this regard, the Court finds that it is well settled that, "where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert" (*Iovino v Kaplan*, 145 AD3d 974, 977 [2d Dept 2016]).

Defendants' assertion that Second Department case law supports their position that the verdict should be set aside is unavailing as the cases cited by defendants are distinguishable from this case. Notably, the cases cited by defendants involve significantly younger plaintiffs, some of whom were able to return to work, or involve plaintiffs who did not suffer a foot drop or undergo hip replacement surgery. In the case at bar, plaintiff underwent hip surgery, was unable to return to work and suffered a foot drop. Significantly, plaintiff's expert Dr. Lubliner testified that to a reasonable degree of medical certainty the injuries to plaintiff's left hip, left foot drop and injury to his sciatic nerve are permanent.

Based on the evidence adduced at trial, the Court finds that the jury's award for plaintiff's pain and suffering is based on a fair interpretation of the evidence and is not against the weight of the evidence. It is well settled that "the amount of damages to be awarded to a plaintiff for

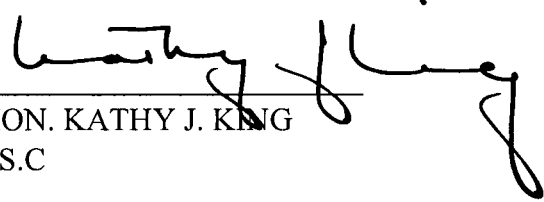
personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation” (*Gualpa v Key Fat Corp.*, 98 AD3d 650, 651 [2d Dept 2012]). Accordingly, the branch of defendants' motion for a new trial on the issue of damages for past and future pain and suffering is denied.

The branch of defendants' motion which seeks to adjust the jury award of \$132,000 representing future lost wages for seven years is also denied. The Court finds that defendants failed to demonstrate that the jury's award for future lost wages was excessive and the result of substantial confusion of the jury. The record indicates that prior to his injury, plaintiff testified that he planned to work for as long as he could and did not definitively state that he planned to retire by a specific age. Plaintiff also testified that at the time of the injury he was in excellent physical shape and had no issues carrying out his job as a roofer. The Court finds that while plaintiff's counsel may not have requested an additional seven years of future lost earnings in summation, a reduction in plaintiff's award would be based merely on speculation. Thus, the jury's award for future lost earnings is not excessive or against the weight of the evidence

Based on the foregoing, defendants' motion is denied in its entirety.

This constitutes the decision/order of the Court.

ENTER,



HON. KATHY J. KING  
J.S.C

HON. KATHY J. KING  
J S C

KINGS COUNTY CLERK  
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